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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 694

ORBO THEATRE CORPORATION,
Petitioner,

v.

LOEW'S, INCORPORATED, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

RESPONDENTS' BRIEF OPPOSING PETITION FOR CERTIORARI

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March 10, 1959

INDEX

	PAGE
OPINIONS BELOW	1
QUESTIONS PRESENTED	2
STATUTES AND RULES INVOLVED	2
STATEMENT	2
REASONS WHY THE WRIT SHOULD NOT BE GRANTED	5
Introduction	5
1. The Clearance Here Involved is Reasonable and Valid	6
2. The Lower Courts Correctly Ruled on the Evidentiary Question Presented	9
CONCLUSION	10
APPENDIX	1a

CITATIONS

CASES:

Binderup v. *Pathe Exchange*, 263 U. S. 291, 312	6
Dipson Theatres v. *Buffalo Theatres*, 190 F. 2d 951 (2nd Cir. 1951), *cert. denied* 342 U. S. 926	6
Fanchon & Marco v. *Paramount Theatres*, 100 F. Supp. 84 (S. D. Cal. 1951), *aff'd* 215 F. 2d 167 (9th Cir. 1954) *cert. denied* 348 U. S. 912	7
Fifth & Walnut v. *Loew's Incorporated*, 176 F. 2d (2nd Cir. 1949), *cert. denied*, 338 U. S. 894	6

PAGE

Robbinsdale Amusement Corp. v. *Warner Bros. P. Dist. Corp.*, 141 F. Supp. 134 (D. Minn. 1955) 8

Theatre Enterprises v. *Paramount*, 346 U. S. 537 ... 6

United States v. *J. I. Case Co.*, 101 F. Supp. 856 (D. Minn. 1951) 10

United States v. *E. I. Du Pont De Nemours & Co.*, 118 F. Supp. 41 (D. Del. 1953), *aff'd* 351 U. S. 377 ... 10

United States v. *Mills*, 237 F. 2d 401 (8th Cir. 1956) 9

Westway Theatres v. *Twentieth Century-Fox F. Corp.*, 30 F. Supp. 830 (D. Md. 1940), *aff'd on opinion below* 113 F. 2d 932 6

STATUTES AND RULES:

Section 3 of the Sherman Act (26 Stat. 209, 15 U. S. C. § 3) 2

Section 4 of the Clayton Act (38 Stat. 731, 15 U. S. C. § 15) 2

Rule 52(a) Federal Rules on Civil Procedure 2

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The respondents, Loew's, Incorporated, et al., distributors of motion pictures, oppose the petition of Orbo Theatre Corporation for a writ of certiorari. The judgment below in favor of the respondents is clearly correct, presents no important or fundamental question of federal law, is not in conflict with any admonition of this Court and involves no conflict of decisions.

Opinions Below

The per curiam opinion of the Court of Appeals affirming the judgment of the District Court, is reported in 261 F. 2d 380. The opinion of the District Court which constituted its findings of fact and conclusions of law is reported in 156 F. Supp. 770.

Questions Presented

1. Whether each of the respondents has imposed an unreasonable restraint of trade in violation of the antitrust laws in denying petitioner's request for an earlier availability than is accorded nearby competing theatres all of which are superior in grossing power, and in granting to the petitioner's neighborhood theatre the same availability which it accorded to all other neighborhood theatres in the District of Columbia and Montgomery County.

2. Whether the Trial Court properly ruled in excluding hearsay testimony embodied in a survey, offered as proof of the facts stated therein.

The Statutes and Rules Involved

The pertinent statutes and rules involved are Section 3 of the Sherman Act (26 Stat. 209, 15 U. S. C. § 3); Section 4 of the Clayton Act (38 Stat. 731, 15 U. S. C. § 15); and Rule 52 (a) of the Federal Rules of Civil Procedure, the pertinent texts of which are set out as an appendix to this brief.

Statement

This is another of the many private motion picture antitrust actions alleging a conspiracy in restraint of trade and involving the question of the clearance accorded first run theatres over second run theatres. The period of clearance here involved—twenty-one days—is the period which elapses between the conclusion of exhibition of a picture at a downtown Washington, D. C., F Street theatre ("first run") and its next exhibition ("second run") at the so-called neighborhood theatres in the District of Columbia and Montgomery County. No second run theatre in the District or Montgomery County re-

ceives pictures on an availability* earlier than twenty-one days after first run Washington (J. A. 19).

Clearance is a practice dictated by the economics of the motion picture industry. There are approximately 18,000 to 19,000 open theatres in the United States (J. A. 200). Over half of these theatres pay a rental of $50 or less to license a positive print of a picture (J. A. 202). For each picture produced approximately 400-525 positive prints are made at costs ranging from $250 to $1,150 per print** (J. A. 198-200).

With these limited prints the distributors serve the theatres throughout the United States. Normally the Washington Exchanges will receive from 7 to 11 prints (J. A. 204, 208) to serve the theatres in the District, Virginia, Maryland and parts of Delaware, with the right to borrow a limited number of additional prints if they are not needed elsewhere.

Since it is obviously impossible to serve all theatres at the same time, there has developed the practice of serving pictures in a series of successive runs with an intervening period of clearance. In Washington, the pictures are shown first run generally at one of the larger, de luxe F Street theatres (J. A. 18). These theatres manifestly are expensive to operate. They charge a higher admission price, have a larger seating capacity and yield far greater revenue than do the so-called neighborhood theatres *** (J. A. 18, 211, 264) (compare Defts. Ex. 26; J. A. 271, 373 with Defts. Ex. 49; J. A. 299, 377). To enable the first run operator to meet his high operating cost and pay this large film rental, it is necessary to give him an exclusive run in his competitive area with a clearance of twenty-one days over second

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*A first run theatre has a clearance of twenty-one days over a second run theatre. A picture then becomes "available" to the second run theatre after the expiration of the clearance period.

**This is in addition to the initial cost of producing a picture which may range from one to four million dollars (J. A. 198-200).

***For example the highest grossing picture at the de-luxe Keith Theatre in 1957, paid a film rental of $124,342. The same picture exhibited at Petitioner's Villa Theatre paid a rental of $126 (J. A. 296-299).

run theatres in the District and Montgomery County (J. A. 211). This assures the first run exhibitor that his competitors will not at the same time or immediately thereafter be exhibiting the same picture and thus diminish the anticipated first run income (J. A. 18, 212). As the Trial Court found in reviewing these factors (J. A. 65-66; 156 F. Supp. at 773), "These are legitimate business considerations".

Petitioner's 630 seat Villa Theatre is located in Rockville, Maryland, approximately 15 miles from downtown Washington (J. A. 6). It is approximately forty minutes by car from Rockville to downtown Washington via two main arteries—Viers Mill Road and Rockville Pike (J. A. 283-284). Additional transportation facilities are provided by railroad and three bus lines (J. A. 45). The Villa Theatre advertises in the Washington newspapers and on radio (J. A. 94-96; Defts. Ex. 2; J. A. 95, 357).

The Villa Theatre is one of a network of small neighborhood theatres in Metropolitan Washington. Its nearest competitor, the Rockville Drive-In, is but one mile away and there are several other competing theatres in nearby Wheaton, Bethesda and Silver Spring. Each of these theatres was open prior to the Villa (J. A. 17, 34-35). All of them play twenty-one days after Washington and all have proven to be better grossing theatres than the Villa. (J. A. 290-293; Defts. Ex. 44; J. A. 294, 374-375).

On October 21, 1955, petitioner addressed identical letters to respondents demanding an availability of fourteen days after first run Washington with clearance over the competing Rockville Drive-In (J. A. 20-21).* Shortly thereafter the operator of the Drive-In advised the respondents that he expected to continue to have clearance over the Villa** (J. A. 31-32, 288).

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*This was subsequently enlarged to a demand in the complaint that the Villa be permitted to play day and date with first run Washington (J. A. 4).

**Prior to petitioner's acquisition, the theatre, then known as the Milo, had played on a later availability than the Drive-In (J. A. 32, 82).

To the respondents faced with these conflicting demands the solution to their common problem was, as the Trial Court found (J. A. 70, 156 F. Supp. at p. 775), "more or less obvious". Each of the distributors acting independently, as the Trial Court found (J. A. 69, 72, 156 F. Supp. at pp. 775, 776), offered to let the petitioner's theatre bid against the Drive-In for pictures on a twenty-one day availability during the drive-in season, and to grant the Villa a twenty-one day availability during the remainder of the year. (J. A. 21-29, 88-89). As one of the respondents stated in explaining its decision to petitioner (J. A. 25-26):

> "If pictures were licensed to you on a 14 day availability, you would then be playing them ahead of all the Washington neighborhood theatres and ahead of the theatres northeast of Washington in the general area of Rockville. We cannot agree to this type of discrimination in your favor."

Following this, petitioner's theatre opened for business on December 1, 1955 (J. A. 79). On February 25, 1956—less than three months later—this suit seeking damages after trebling of $660,000 and injunctive relief was begun.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

Introduction

This case was tried below basically upon the theory that there was a conspiracy among the defendants to restrain trade in violation of the antitrust laws. The District Court found after a careful review of the evidence that there was no proof of conspiracy or concerted action stating (J. A. 69, 156 F. Supp. at p. 775):

> "There was no evidence, direct or circumstantial, oral or documentary, from which an inference of even re-

mote cooperation among the defendants in this matter could be derived."

This finding was not challenged in the Court of Appeals.

Since a finding of conspiracy is an essential element of petitioner's right to recover, *Theatre Enterprises* v. *Paramount*, 346 U. S. 537, 540; *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 312, petitioner's failure to challenge in the Court of Appeals this finding on an element essential to recovery, renders moot the issues which it raises here.

Even were this not the case, the claimed errors assigned are without merit.

1. The Clearance Here Involved Is Reasonable and Valid

The practice of runs and clearances, as such, has been recognized as indispensable to the motion picture industry. *Fifth & Walnut* v. *Loew's Incorporated*, 176 F. 2d 587 (2nd Cir. 1949), *cert. denied*, 338 U. S. 894; *Dipson Theatres* v. *Buffalo Theatres*, 190 F. 2d 951 (2nd Cir. 1951) *cert. denied*, 342 U. S. 926; *Westway Theatres* v. *Twentieth Century-Fox F. Corp.*, 30 F. Supp. 830 (D. Md. 1940), *aff'd on opinion below*, 113 F. 2d 932 (4th Cir. 1940).

The District Court found that requiring the petitioner's Villa Theatre to wait twenty-one days after first-run Washington did not impose an unreasonable restraint of trade (J. A. 75, 156; F. Supp. at 779). The decision was affirmed by the Court of Appeals per curiam. The finding is not "clearly erroneous" within the purview of Rule 52(a) of the Federal Rules of Civil Procedure. It is, in fact, clearly correct.

Petitioner first appears to contend that the District Court did not consider the relevant factors in determining the validity of the clearance. This contention, also made unsuccessfully in the Court of Appeals, is without merit.

In making its finding of reasonableness the District Court considered *inter alia*: the impracticality of showing a picture

contemporaneously at all theatres; the larger size and higher admission prices of the first run houses and their central location; the need to protect these theatres by a clearance period against the undue inroads of competition; the fact that these first run theatres yield a substantial portion of the distributors' revenue; and the geographic proximity of Rockville to downtown Washington (J. A. 64-66, 156 F. Supp. at pp. 772-774). Finally, the Court considered the resulting discrimination against competitors of the Villa Theatre if the latter's request for a lesser clearance period were granted, stating (J. A. 67, 156 F. Supp. at 774):

> "This request posed a problem for the distributors. The Drive-In Theater is commodious, has a considerable capacity, and was in successful operation. To have yielded to the demand, would have been to discriminate against the Drive-In Theater. Moreover, pressure on the part of theaters in Bethesda, Silver Spring and Wheaton for similar treatment and, therefore, a reduction of the twenty-one day clearance to a fourteen-day clearance could reasonably be anticipated in the event that the request of the Villa were granted. In turn, there was a possibility of repercussion from neighborhood houses in Washington."

The relevancy of these factors is perhaps best demonstrated by *Fanchon & Marco* v. *Paramount Pictures* 100 F. Supp. 84 (S. D. Cal. 1951), *aff'd*, 215 F. 2d. 167 (9th Cir. 1954), *cert. denied* 348 U. S. 912. There the Court stated (100 F. Supp. at p. 98):

> "Whenever a change of availability is asked, the producer has two considerations to take into account: (1) Whether the change would result in additional revenue, and (2) whether the change would affect other theatres in the area."

The discriminatory effect of petitioner's demand was found by the Court. Certainly no reason appears from this record

why the poorest grossing theatre in the area should have been granted such an advantage over its nearest competitors. Similarly, petitioner failed to show that the granting of its request would result in additional revenue. Rather, the converse is true. The record is clear that granting the Villa a fourteen-day availability would probably result in a loss of a first run exhibition and certainly would have reduced materially a picture's value to the first-run exhibitors and hence to the distributors (J. A. 275). Certainly no distributor could reasonably be expected to risk the possible loss or diminution of its first run revenue by acceding to petitioner's discriminatory request.

Petitioner further urges that the lower courts were somehow derelict in failing to determine (Petition, pp. 10-11) ". . . that there should be no clearance or, if the facts justified some clearance, to say precisely what the clearance should be". This curious argument confuses not only the function of the courts but also the record. The Court did determine that clearance was proper and did decide that a twenty-one day clearance was reasonable. Having reached this determination its function was ended. To urge that it should judicially declare that while a twenty-one day clearance was not unreasonable, a fourteen-day clearance was prescribed would be, as the Trial Court recognized (J. A. 75, 156 F. Supp. at p. 778), to "substitute its own judgment for the business judgment of the parties". This the courts will not do. As the Trial Court recognized (J. A. 75, 156 F. Supp. at p. 778) in discussing this point and quoting from *Robbinsdale Amuse. Corp.* v. *Warner Bros. P. Dist. Corp.* 141 F. Supp. 134, 141 (D. Minn. 1955):

> " 'The distribution and allocation of motion pictures to theatres will always present a difficult and delicate problem. Courts should be hesitant to disrupt an established system of runs and clearances in absence of convincing proof that its genesis is the result of conspiratorial connivance, and that it is unreasonable.' "

2. The Lower Courts Correctly Ruled on the Evidentiary Question Presented.

The petitioner assigns as one ground for the granting of the writ that the courts below erred in a ruling on an evidentiary question. This contention arises from the exclusion by the Trial Court of certain hearsay testimony attempted to be offered by the petitioner through the witness Hoyt (J. A. 152-155). The Court of Appeals in its per curiam decision affirmed this ruling, 261 F. 2d 380, 381.

The proffered evidence from which this ruling arose was the attempt by petitioner to introduce the results of a survey, offered as evidence, not of a state of mind but rather to prove the facts stated therein. On appeal the petitioner urged primarily that the witness could state an opinion based on the results of a survey even though the survey itself might be inadmissible. Now petitioner is urging as an alternative ground that the survey itself was admissible.

The first ground was not presented to the Trial Court. The question asked to which objection was made was (J. A. 145):

> Q. "Would you tell us, Mr. Hoyt, from the tabulation which you have obtained, first of all the percentage of the population of the city of Rockville who are moviegoers?
>
> Mr. Caskey: That is objected to."

This question and the objection thereto were the basis of the trial court's ruling and it is clear from an examination of the record J. A. 145-155, that petitioner was not offering any opinion testimony but rather was attempting to establish as facts the results derived from the survey. The petitioner cannot now construct a line of testimony not tendered in the trial court and then complain that it's exclusion constitutes error. *United States* v. *Mills*, 237 F. 2d 401 (8th Cir. 1956). Furthermore the contention made by the petitioner that the survey

itself was admissible is wholly invalid. The witness Hoyt, through whom the testimony was proffered, had participated in the development of the questionnaire used, but had not supervised the survey or compiled the results (J. A. 143-145). This was done by a third party (J. A. 144-145) not called as a witness, who in turn employed seventeen students not otherwise identified to conduct the actual interviewing (Pl. Ex. 5 for iden., J. A. 50). They in turn had questioned the interviewees not only about their motion picture going habits but also those of other members of their families not actually interviewed (J. A. 154). The information thus proffered by the witness Hoyt was hearsay at least three times removed from the persons who knew the actual facts. Furthermore neither the supervisor of the survey nor the interviewers were proffered as witnesses to establish the reliability of the procedures actually followed in conducting the survey. Thus, quite apart from the basic objection to the competency of hearsay testimony offered as proof of the facts stated therein, the instant survey could not meet even minimal guarantees of trustworthiness and reliability.

While survey evidence has been admitted in those cases in which it comes within a recognized exception to the hearsay rule—i.e., the so-called "state of mind" exception—in no case that we know of—and the petitioner has cited none*—has a survey, offered as proof of the facts stated therein, been admitted over the hearsay objection. The Trial Court properly excluded this evidence.

CONCLUSION

For all the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari to review the judgment

*In neither the opinion in *United States* v. *J. I. Case Co.*, 101 F. Supp. 856 (D. Minn. 1951) nor the opinion in *United States* v. *E. I. Du Pont De Nemours & Co.*, 118 F. Supp. 41 (D. Del. 1953), *aff'd.* 351 U. S. 377 cited by petitioner (Petition p. 12) does it appear that the hearsay objection was considered.

of the Court of Appeals for the District of Columbia Circuit in this case should be denied.

Respectfully submitted,

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APPENDIX TO RESPONDENT'S BRIEF

Pertinent Statutes and Rules

Section 3 of the Sherman Act of July 2, 1890, c. 647, 26 Stat. 209, 15 U. S. C. A. § 3 reads in pertinent part:

> "Every contract, combination in form of trust or otherwise, or conspiracy, in retraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. . . ."

Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. A. § 15 reads:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in the controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Rules 52(a) of the Federal Rules of Civil Procedure reads in pertinent part:

> ". . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses. . . ."